(6)

FILED
NOV 19 2004
OFFICE OF THE CLERK

No. 04 - 6964

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2004

JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

STEPHEN B. BEDRICK
Counsel of Record
Attorney at Law
1970 Broadway, Ste 1200
Oakland, CA 94612
Phone: (510) 452-1900
Fax: (510) 452-1980

ERIC SCHNAPPER
University of Washington
School of Law P. O. Box 353020
Seattle. WA 98195
Phone: (206) 616-3167
Fax: (206) 685-4469

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. THE PARTIES AGREE THAT CERTIORARI SHOULD BE GRANTED 1

CONCLUSION 3

TABLE OF AUTHORITIES

CASES **PAGE**

Batson v. Kentucky,
476 U.S. 79 (1986) 1, 2

People v. Johnson
(2003) 30 Cal.4th 1306 ..... 1, 2

Hernandez v. New York
500 U. S. 352 (1991) 3

I.

THE PARTIES AGREE THAT CERTIORARI SHOULD BE GRANTED

Petitioner Jay Shawn Johnson is pleased that Respondent state of California agrees with him this year, as it did last year in case no. 03-6539, that certiorari should be granted. Petitioner concurs with Respondent that there is a direct and continuing conflict between the California Supreme Court and the federal Court of Appeals for the Ninth Circuit on the issues presented here. The degree of conflict is substantial. Petitioner concurs with Respondent that the conflict warrants a grant of certiorari. Such agreement does not often arise in a criminal case.

Respondent's memorandum in support of grant of certiorari disagrees with Petitioner as to the meaning of the term "if unexplained" in the text of the "Question Presented." A dispute about the meaning of a phrase within the Question Presented is surely within the scope of the Question Presented. This dispute should not interfere with the grant of certiorari. It can be resolved on merits briefing.

The Question Presented reads:

> Whether to establish a prima facie case under Batson v. Kentucky, 476 U.S. 79 (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on that impermissible group bias?

This is the identical Question Presented as in the prior case, Johnson v. California, case no. 03-6539. The text of that Question Presented was drafted by the Court a year ago, in November, 2003, in lieu of the Questions Presented submitted by Petitioner.

The Question Presented inquires into both the strength of the evidence needed to establish a prima facie case, and whether, in evaluating the prima facie case, possible explanations should be considered. The Question Presented is not, as the state suggests, merely limited to the degree

of persuasiveness of the objector's evidence at step one of Batson analysis; it also encompasses the question about whether or not a particular type of evidence -- proposed or hypothesized explanations -- should be considered at step one.

At step one of Batson analysis the trial court considers the sufficiency of the objector's showing "if unexplained," meaning before an explanation is given, because the very purpose of determining if there is a prima facie case is to decide whether to require the challenger to proffer an explanation. It makes no sense, and is contrary to Hernandez v. New York, 500 U. S. 352, 359 (1991), for a trial court to find no prima facie case, and excuse the challenger from giving a reason, merely because the court thinks that it might be able to articulate a race-neutral explanation.

It makes even less sense, and is similarly contrary to Hernandez, to reject a prima facie case because an appellate lawyer, or an appellate judge, is able to articulate an explanation of his or her own, after the fact, for the disputed peremptory. It is irrelevant whether the trial judge, or an appellate lawyer, or an appellate judge, if he had been trial counsel for a party, might have used a peremptory challenge against a juror. If the exercise of that challenge was in fact motivated by impermissible motives of the specific prosecutor in this case, that challenge violated the constitution, regardless of whether a third party, after the fact, on paper, might be able to argue that the state's actions could satisfy a rational basis test.

These principles equally apply to analysis at the trial court level and to review at the appellate level.

For these reasons, the Question Presented is correctly stated.

///

///

///

CONCLUSION

Petitioner respectfully requests that the Court grant certiorari this year, to complete the work which was begun last year in case no. 03-6539.

Dated: November 19, 2004

STEPHEN B. BEDRICK
Counsel of Record
Attorney at Law
1970 Broadway, Ste 1200
Oakland, CA 94612
Phone: (510) 452-1900
Fax: (510) 452-1980

ERIC SCHNAPPER
University of Washington
School of Law P. O. Box 353020
Seattle. WA 98195
Phone: (206) 616-3167
Fax: (206) 685-4469

Counsel for Petitioner